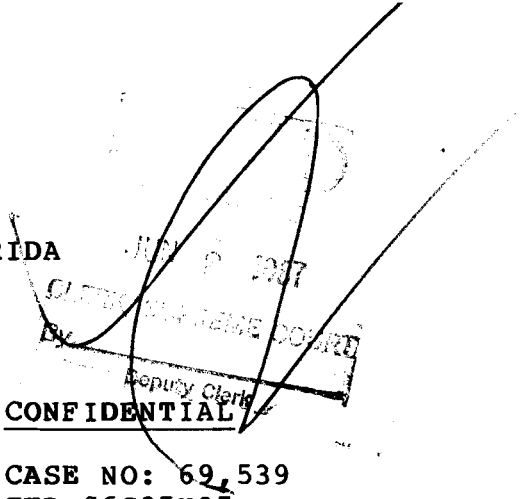
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

v.

JUSTIN R. LUMLEY,

Respondent.
_____/

CONFIDENTIAL

CASE NO: 69,539
TFB 06C85H97

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE

This is a case of original jurisdiction pursuant to Article V, Section 14 of the Constitution of the State of Florida.

On May 13, 1986 the appropriate grievance committee found probable cause for further proceedings against Respondent for violations of rule 11.Ø2(4) of Article XI of the Integration Rule of The Florida Bar and its bylaws and for a violation of Disciplinary Rule 9-1Ø2(A) of the Code of Professional Responsibility. The Committee's findings were based on the December 19, 1985 audit report by a Bar auditor covering the period April 1984 through October 1985.

The case was heard before the Honorable Thomas M. Gallen, Referee, on February 1Ø, 1987. On February 17, 1987 the Referee found Respondent guilty of the abovementioned violations. He recommended that Respondent be given a private reprimand by the Board of Governors and that he be placed on probation for three years. The Referee further recommended that in the event Respondent returned to the private practice of law he immediately notify The Florida Bar of that fact and that he arrange for his trust account to be audited quarterly by a certified public accountant for two years at his expense.

Respondent was also assessed $1,169.52 in costs.

The Florida Bar Petitioned for Review of the Referee's Report on March 3Ø, 1987. On appeal the Bar requests a thirty-day suspension and probation consistent with the Referee's recommendation.

STATEMENT OF FACTS

This statement of facts is offered to clarify and to expand the Statement of Facts in the Bar's initial brief.

Respondent is 50 years old and was admitted to the Ohio Bar in 1963 and to The Florida Bar in 1969 (TR 27). He has no prior disciplinary history in either state (TR 4).

While practicing in Ohio, Respondent was a part time prosecutor, an evidence teacher and was even appointed Acting Municipal Court Judge in the City of Lorraine, Ohio (TR 28). He also has a laudable history of participation in organizations that raise funds for charitable purposes.

Respondent moved to Florida in 1982 to set up practice with his brother-in-law. However in 1984 they had serious disagreements, and in April 1984 Respondent began a solo practice in St. Petersburg (TR 7). Opening such practice was never Respondent's intention. His attempt to run a small practice was unsuccessful, and by early 1985 he realized he had to wind down his practice (TR 11). At that time he stopped accepting new clients (TR 14).

On May 1, 1985 Respondent filed for bankruptcy (TR 13). As a result of that action, he lost his house and all equity in it (TR 13), and all his office equipment was repossessed in June or July 1985 (TR 7). Respondent came out of bankruptcy with no assets (TR 23).

Respondent discharged no client obligations in bankruptcy (TR 17).

When Respondent began his solo practice in April, 1984, he opened one trust account at Park Bank. He opened a second one in January, 1985 at Rutland Bank because it was more conveniently located. The latter account was closed around October, 1985. Although he only asked for an Automatic Teller Card (ATM Card) for the operating account, the bank sent one for the trust account instead. For reasons relating to general office procedures, Respondent began using the trust account for personal deposits and debits, and for all deposits, including earned fees and, in one instance, his tax refund. Although he realized it was improper to commingle funds, he did not believe that he was doing so to the extent that the audit later revealed.

Respondent testified that, should he need to make up his deficits on short notice, as a last resort he could borrow from his relatives (TR 26).

No client lost any funds or had any disbursements delayed by Respondent's actions. No trust fund checks were ever dishonored. No clients ever complained about the handling of their cases. He had no intent to permanently use client trust funds (TR 4), but only commingled funds temporarily to expedite the winding-down of his practice.

Respondent has worked his way up in the Home Shopper's Network from laborer to the key position of corporate counsel, a sensitive and important position (TR 31, 33). He believes a public discipline may cost him this job, which he has worked so hard to obtain and one which he dearly loves (TR 31, 34).

Respondent's bankruptcy was the genesis of the Bar's audit. (TR 4). No client complained of Respondent's actions (TR 14).

SUMMARY OF ARGUMENT

Respondent was accused of violating the Bar's trust accounting rules and of commingling his personal funds with his client's trust funds. He admits those offenses.

The Bar admits that no clients were harmed by Respondent's actions and that Respondent had no intention of permanently depriving any clients of monies rightfully belonging to them. There were no dishonored trust fund checks, and there were no delays in disbursements. No clients were even inconvenienced, let alone prejudiced.

Respondent was not charged in the Bar's complaint with any acts of a dishonest nature. Nor were any rules relating to dishonesty cited.

The mitigating factors in this case remove it from the realm of one requiring a public discipline to a private reprimand as recommended by the Referee. Those factors include: 24 years of practice without a blemish, including stints as a part-time prosecutor and a municipal judge; the fact that no checks were ever dishonored, there were no delays in disbursing trust funds and that no clients lost money; that when deficits began appearing, Respondent immediately ceased accepting new clients and began winding down his practice. Respondent's first deficit occurred in November 1984. From early 1985 until he stopped practicing in October 1985, Respondent's practice was limited to closing out his practice. By July 1985, he was down to three clients.

Another mitigating factor is the effect a public discipline would have on him. Respondent started working for a public corporation as a laborer in October 1985. By July 1986, he had worked himself up to a key employee position (held by 14 of 4200 employees). A public disciplinary order might result in his losing this job.

Respondent argues that a private reprimand along with notification to The Florida Bar and two years quarterly audits of Respondent's trust accounts at his expense if he returns to private practice, and payment of costs in this action, are sufficient sanctions for his misconduct.

ARGUMENT

RESPONDENT'S MISCONDUCT, WHEN CONSIDERED IN LIGHT OF THE MITIGATING FACTORS INVOLVED, WARRANTS A PRIVATE REPRIMAND.

Respondent does not argue to this Court that his conduct does not merit discipline. He admits to the Bar's allegations of misconduct, i.e., failure to abide by the Bar's trust accounting rules and commingling his personal funds with his trust funds. He realizes that a sanction is appropriate. However, the unusual and numerous mitigating factors present in this case make it one warranting only a private reprimand.

The most important mitigating factor is Respondent's past history. Respondent is not an unethical lawyer. The public does not need protection from him. Respondent has practiced law from 1963 until now without a blemish on his record. He is a former judge, a former prosecutor and a former evidence instructor to police recruits at a community college.

Respondent is not a dishonest person. He is 50 years old and has been married over 24 years. Until he moved to Florida he was active in charitable organizations and he served six years in the military. He is an honorable person, and, excepting for the period November 1984 to October 1985 he has been the epitome of our profession.

It was only when, in November 1984, after six months of practice in a new city as a sole practitioner, without connections or past clients, and in the first-time ever situation of being a sole practitioner, that Respondent resorted to less

than sterling conduct.

In November 1984, Respondent allowed his trust account to fall below its client obligations. His misconduct was the result of using this trust account as a general account. And were it not for his steps to ameliorate the effects of his misconduct, a public discipline might be appropriate. But, Respondent did protect his clients.

When Respondent realized his financial position was becoming precarious, he responsibly stopped accepting new clients and began winding down his practice. He did not accept a new client after early 1985 (TR 11), and devoted the remaining portion of his practice to winding down his caseloand with "honor" (TR 14).

This is not a case where Respondent, over numerous years robbed Peter to pay Paul. As soon as he realized the gravity of his situation, he began closing out his practice. By July, he was down to three clients. By October 1985, Respondent had closed his practice completely.

That Respondent succeeded in closing down his practice with honor is evidenced by the fact that no client complained about him. The Bar initiated its investigation as a result of Respondent filing for bankruptcy in May 1985 (TR 4). Six months later, after Respondent had closed out his practice, the Bar audited his trust account.

Respondent's problems with his trust account, the first ethical problems he ever had in over twenty years of practice, were the direct result of his entering into a sole practice in

Florida. He moved to Florida from Ohio with the intention of practicing with his brother-in-law. That endeavor failed. In April, 1984, Respondent found himself practicing alone. Such was not his intention (TR 11).

Respondent took over another lawyer's office (not his caseload, however) and that lawyer's substantial bank obligations, when he started his fledging practice. But, as Respondent describes it:

> I had very few files. I didn't know anybody in town. I didn't know the Judges well. I didn't have any resources to draw on. I had what I took with me, and that was about it (TR 12).

Respondent's attempt to start a new practice by himself in a new state was a financil catastrophe. Although he originally opened both a general and a trust account, Respondent ultimately discontinued using the general account and deposited everything into his trust account, including earned fees received and personal fees. He then failed to keep adequate records of his disbursals and, at times, he depleted his trust account funds below his client obligations.

The Bar laudably stipulated that Respondent had no intent to permanently deprive clients of funds and that no client was harmed (TR 4). The validity of the Bar's stipulation is evidenced by the fact that no trust account checks ever bounced and by the fact that there was no delay in the disbursal of any funds.

Respondent's lack of intentional wrongdoing is manifested by his deposit into his trust account his entire 1984 tax return of $4,777.00 (TR 20).

Respondent's deposit of hsi tax return check resulted in a surplus in hsi account of $1,555.33 (Bar Ex 1, page 5).

Admittedly, Respondent mishandled his trust account. But, even then, his concern for his clients and his personal ethics caused him, within two months of his first shortage in trust, to elect to wrap up his practice.

In early 1985, he accepted his last new client (TR 14). By July 1985 he was down to two or three clients whose cases were not finished (TR 15).

In fact, during the 19 months Respondent practiced alone, he only accepted funds in trust on behalf o about six people (TR 8). Obviously, Respondent was not running his practice to enable him to rob Peter to pay Paul.

Respondent's prompt recognition of his poor financial position and his immediate decision to wind down his practice are material mitigating factors.

But, even more substantial mitigation is Respondent's protection of his clients' cases and their funds. Not one client lost a penny. Despite the fact that Respondent had to declare bankruptcy which resulted in his losing his house and all the equity in it (TR 13) and tht he came out of bankruptcy with no assets (TR 23).

Even when all of Respondent's office furnishings and

equipment were repossessed in June or July 1985 (TR 7), he still worked diligently to close out his remaining cases out of his apartment (TR 15).

As his final element of mitigation, Respondent asks this Court to consider the rehabilitation he has already accomplished. such rehabilitation can be considered by the Referee in determinging discipline. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

Respondent, in October 1985, upon wrapping up his caseload, took a job as an assembly line packer working for Home Shopping Network, the fifth largest television network in the County (TR 31 & 34). By July 1986 he had worked his way up to corporate counsel (TR 31). As such, he supervises the legal aspects of purchases by his company ranging from $8,000,000.00 to $35,000,000.00 (TR 32). He is now considered one of 14 "key" employees in a workforce of 4,200 (TR 33 & 34).

When asked if he likes his current job, Respondent replied: "I love it" (TR 31). A recess then was taken because of Respondent's emotional state. Later, he testified that there was "a very real possibility" that a public discipline could result in his losing his job (TR 34).

Respondent submits that the Referee's recommendations are fair and that they should be upheld.

The Bar has the burden of showing that the Referee's recommendation is erroneous, unlawful or unjustified. Rule 3-7.6(5) of the Rules Regulating The Florida Bar. The Bar has

failed to meet this burden.

Respondent is in the difficult position of not being able to cite cases in which private reprimands for such violations as his have been given. However, Respondent is aware of one case in which a lawyer's second instance of trust account related misconduct resulted in a public reprimand, The Florida Bar v. Mitchell, 493 So.2d 1018 (Fla. 1986).

In Mitchell, despite a three-year period (May 1980 to May 1983) of commingling and poor record-keeping, and despite a prior private reprimand in 1978 for the same offense, this Court publicly reprimanded the accused lawyer.

Mitchell is significant because it shows that occasionally misconduct such as that in the instant case merits only a private reprimand.

Reprimands for failing to abide by the Bar's trust accounting rules and for commingling are consistent with the three purposes of discipline as enunciated in Lord. There, the Court said on page 986 that any discipline imposed should be fair to the public, i.e., protecting them from unethical conduct; fair to the lawyer in that it will help rehabilitate him; and lastly, that it will serve as a deterrent to other lawyers.

The discipline imposed by this Court, while giving "due regard to the public interest" should also be fair to the Respondent. The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961). In that case, this Court said that the sanction imposed:

> Should not reflect a retributive penalty. Its objective should be to correct the

> wayward tendency in the accused lawyer while offering to him a fair and reasonable opportunity for rehabilitation. . . .

The able and experienced Referee in these proceedings obviously considered the effect of a public discipline on Respondent in making his recommendation. On page 3 of his report, he said:

> A public disciplinary action could result in a loss of his employment.
>
> The less severe punishment is recommended because of the Respondent's disciplinary free record of over 22 years in private practice, his public and professional service, and overall good character.

The appropriate sanction in disciplinary cases:

> depends entirely upon the factual situation presented by the record in that particular case.

The Florida Bar v. Scott, 197 So.2d 518 (Fla. 1967).

The record in the instant case shows an honorable lawyer who for 11 months in an otherwise distinguished career of 22 years deported from the highest order of professionalism. Even then, no clients were harmed because of the lawyer's concern for their well-being.

Respondent argues that after considering the unique facts of this case, that a private reprimand along with the three years' probation and costs will serve with the first two purposes stated in Lord. The private reprimand and the three years' probation

recommended as well as Respondent's bad experience with this incident, will protect clients from any future such conduct, and will serve to rehabilitate him. Respondent has already begun self-rehabilitation by working his way up from position of packer to position of corporate counsel. By doing so, he removed himself from private practice, where his problems occurred. He has no desire to return to private practice since this episode.

This Court's prior numerous discipline for trust accounting misconduct are sufficient to deter other lawyers. Publicly disciplining Respondent will not accomplish any more deterrence than past case law.

In making such an assertion, Respondent emphasizes that his misconduct was not due to dishonesty, that no client was harmed or prejudiced, and that he has never once been disciplined in over twenty-four years of service.

A thirty-day suspension, as urged by the Bar is contrary to the Referee's recommendation, is too harsh, and is unnecessary in this case. It focuses on retribution contrary to Ruskin.

Respondent argues that under The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), suspension is not warranted for a first offense for trust accounting errors. In Neely, a sixty-day suspension was given for his third incident of misconduct, which was mismanagement of a trust account as a result of gross negligence. The court states:

> "Although the discipline for a violation of this kind ordinarily would be a public reprimand and probation. . . ., we find that, because Respondent has been disciplined on

> two prior occasions, a more severe discipline is appropriate in this proceedings."

Neely, at 536. Respondent, unlike Neely has never been disciplined, let alone two previous times. Therefore, under Neely, the appropriate discipline is a reprimand and probation. With the added mitigating factors in Respondent's case, however, a private reprimand should suffice.

The Bar cites The Florida Bar v. Heston, 501 So.2d 597 (Fla. 1987), where this Court ordered a public reprimand and probation. In Heston, the Respondent had a deficit of over $7,000.00, but showed little evidence of mitigation. Heston, therefore, stands for the proposition that Respondent should receive no more than a public reprimand and that the suspension the Bar requests is not appropriate.

Finally, Respondent would argue that his position, and the Referee's recommendation, are appropriate under The Florida Bar v. Reese, 263 So.2d 794 (Fla. 1972). In that case, attorney Reese converted about $780.00 from an estate, did not disburse the money to the clients, and repeatedly ignored letters, phone calls and personal demands for the money. In a second transaction, he converted $1,200.00 and repeatedly ignored demands that the money be delivered over. In spite of the fact that this was Mr. Reese's second disciplinary action, that he failed to make restitution for five years in one case, and that he had already had a prior public reprimand, this Court imposed a public reprimand. The Court noted his restitution in mitigation.

The Reese court also pointed out that Reese's plans to leave private practice to seek a government job was an element to be considered in mitigation of discipline. The same should be true in the instant case.

Bar Counsel argues that a private reprimand is insufficient under The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978). In that case, Horner was found guilty of violation of Disciplinary Rules 9-102(A), and 9-102(B)(3) and (4). Here, Respondent was not charged with violation of rules 9-102 (B)(4) which prohibits the failure to deliver trust funds when due. In other words, he has been charged with no intentional wrongdoing. The Bar stipulated that Respondent had no intention of permanently depriving any clients of monies rightfully belonging to them (TR 4). Therefore, Horner is not an appropriate comparison to the case at bar.

The Bar argues that Respondent "could have avoided the misuse of client funds by obtaining a loan from his in laws, but he failed to do so." (Pet. Brief, p.7). Respondent's testimony related to securing funds in emergencies.

Complainant asserts that The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980) is applicable here. Welty, however, had deficits in his trust fund for at least two years and amounting at times to over $24,000.00. Furthermore, he was found guilty of violating DR 9-102(B)(4), i.e., his misconduct involved intent. There were also delays in disbursal involved. None of these factors are involved at Bar. The Referee in Welty recommended a

six-month suspension, while the Referee here, after carefully evaluating all the factors, has recommended a private reprimand. The Referee's decision should be honored.

In Welty, this Court cites numerous cases in which the Court had given public reprimands for trust fund misconduct, including The Florida Bar v. Austin, 259 So.2d 142 (Fla. 1972); The Florida Bar v. Pink, 236 So.2d 97 (Fla. 1970); The Florida Bar v. Reese, 247 So.2d 718 (Fla. 1971); The Florida Bar v. Novak, 313 So.2d 727 (Fla. 1974); and The Florida Bar v. Terry, 333 So.2d 24 (Fla. 1976). The Welty case, and the cases cited therein show that the appropriate sanction for Respondent here would be at most a public reprimand.

Finally, the Bar asserts that The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985) supports a rejection of the Referee's recommendation. Attorney Moxley was, however, commingling client trust funds with funds for a separate personal business venture. His offense was over a long period of time and not, as was true in the instant case over a short time in an attempt to wind-down his affairs. Simply put, Moxley did not entail the mitigation at bar.

The Bar urges this Court to disregard the fact that Respondent will probably lose his job if he is publicly disciplined. This is the antithesis of encouraging rehabilitation as encouraged in Scott. Respondent, before the audit, began his own rehabilitation, and the Bar would ignore the second principle of Lord and destroy all the gain he has made

for some unrealistic ideal.

The Bar has failed to show that the Referee's recommended discipline is clearly erroneous. The numerous mitigating factors in this case, include: (1) no prior record in 22 years of practice; (2) no harm to clients; (3) no dishonest intent; (4) a sterling record of community service including serving as a judge, a prosecutor, serving six years in the military and extensive community service; (5) Respondent's quickly winding down his practice when he realized his predicament; (6) his complete loss of all his assets; and, finally (7) his steps to rehabilitate himself through hard work, first in a nonlawyer capacity, and now as a corporate counsel. These mitigating factors, as noted by the Referee, make a private reprimand the appropriate sanction.

In addition to the Bar's failure to show the Referee's report is erroneous, there is another important reason for this Court to adopt the Referee's recommendation. Only the Referee can actually observe the Respondent and evaluate his demeanor, his attitude and his remorse. In the transcript of proceedings, on page 31, there is no mention as to why a recess was taken. The transcript does not indicate the Respondent was on the verge of tears. However, it must be assumed the Referee noted it.

A lawyer's "attitude toward the underlying misbehavior" is a proper element to be considered in imposing discipline. The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1986). Here, only the Referee could observe the Respondent's attitude as expressed

by his demeanor while testifying. It was a proper factor for the Referee to consider in determining a sanction.

The Referee is a learned and respected judge. His recommendation should be upheld.

CONCLUSION

The Referee's recommended discipline is appropriate for violations of the two aforementioned rules and should be adopted by this Court. He should be privately reprimanded and placed on probation for three years. Should Respondent return to the private practice of law, he must notify the Bar and submit to quarterly audits by a CPA for two years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Initial Brief has been furnished by U.S. Mail on this 8th day of June, 1987 to THOMAS E. DeBERG, Bar Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607.

JOHN A. WEISS